

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
Marshall Johnson
Thomas Pugh
Phyllis A. Reha

Chair
Commissioner
Commissioner
Commissioner

In the Matter of Qwest Corporation's
Arrangements for Commingled Elements

ISSUE DATE: June 26, 2007

DOCKET NO. P-421/C-07-370

In the Matter of Qwest Corporation's
Conversion of UNEs to Non-UNEs

DOCKET NO. P-421/C-07-371

NOTICE AND ORDER FOR HEARING

PROCEDURAL HISTORY

On March 30, 2007, the Commission issued its ORDER RESOLVING ARBITRATION ISSUES, REQUIRING FILED INTERCONNECTION AGREEMENT, OPENING INVESTIGATIONS AND REFERRING ISSUE TO CONTESTED CASE PROCEEDING in Docket Nos. P-421/AM-06-713, P-5340, 421/IC-06-768, P-421/CI-07-370 and P-421/CI-07-371. In that Order, the Commission resolved a number of issues arbitrated between Eschelon Telecom and Qwest.

However, two issues remained unresolved which the Commission referred to further proceedings in the instant dockets:

- a. Whether the price charged to a Competitive Local Exchange Company (CLEC) for the conversion of an Unbundled Network Element (UNE) to a non-UNE should be based on the Total Element Long Run Incremental Cost (TELRIC) methodology and what the appropriate price should be. Docket No. P-421/CI-07-370.
- b. Whether Qwest's procedures for handling commingled elements are appropriate and what the appropriate prices should be. Docket No. P-421/CI-07-371.

On March 30, 2007, the Commission issued a Notice soliciting comments on the scope of, and procedures for, the investigations and on whether the two dockets should be combined in a single proceeding, referred to an existing proceeding, or addressed individually.

On May 11, 2007, the Minnesota Department of Commerce (the Department), Eschelon ,and Qwest filed comments.

On May 24, 2007, Eschelon filed Reply Comments.

On May 25, 2007, the Department and Qwest filed Reply Comments.

The Commission met on June 14, 2007 to consider this matter.

FINDINGS AND CONCLUSIONS

I. Qwest's Challenge to Commission Jurisdiction and Authority

In its May 11, 2007 comments, Qwest questioned the Commission's jurisdiction and authority to decide the two remaining unresolved issues in these dockets. Qwest stated that the Commission's authority is limited to establishing terms and conditions for services and elements that are mandated by Section 251 of the Telecommunications Act of 1996 (the Act) and argued that Eschelon's requests asked the Commission to act beyond its authority because it asked the Commission to impose terms and conditions for services and network elements that ILECs are not required to provide under Section 251.

Qwest stated that to determine the proper scope of these dockets it is necessary for the Commission to decide 1) the limitations on its jurisdiction over issues relating to UNE conversions and commingled arrangements and 2) the legal standard to apply in evaluating Qwest's processes and systems for UNE conversions and commingled arrangements, including the effect of prior rulings from state commissions and the FCC finding that Qwest's ordering, provisioning, and billing processes and systems meet the Act's requirements .

Qwest recommended that the Commission set a briefing schedule for the participating parties to address these threshold legal issues. Qwest stated that after the Commission decides these issues, it should then identify any remaining issues to address in these dockets and set an appropriate procedural schedule. Further, in identifying the issues for these proceedings, the Commission should avoid any duplication of the issues under consideration in the Minnesota wire center proceeding, Docket No. P-999/CI-06-685.

Finally, Qwest recommended that the Commission consolidate these dockets.

II. Eschelon's Reply Comments

Regarding the 370 Docket, Eschelon stated that all parties agreed that there are some fundamental questions of law, Commission authority, and policy that must be addressed to decide the matter. Therefore, Eschelon recommended that the Commission set a schedule for comments to address the scope of the Commission's authority over Qwest's conversion charges and the appropriateness of such charges, including the cost standards to apply to any conversion charges.

As to the 371 Docket, Eschelon stated that given the legal and jurisdiction issues that have been raised and the fact that such issues would likely be addressed in comments to be filed in Docket 07-370, it may make sense to address those issues in both dockets simultaneously before referring this docket to an Administrative Law Judge.

III. The Department's Reply Comments

The Department noted that three parties (Eschelon, Qwest, and the Department) had provided procedural recommendations for handling the two dockets: the 370 Docket and the 371 Docket. The Department noted that there was general agreement that the Commission should initially address certain legal and policy issues prior to addressing the terms and process of Qwest's conversion of UNEs (370 Docket) and commingling elements (371 Docket).

The Department recommended that the Commission request comments and reply comments on the threshold legal and policy questions for the two cases. Once the Commission has decided those initial matters, the Department stated, procedures could be set to address the remaining issues. The Department also advised that if the Commission decided to send all these matters to an Administrative Law Judge (ALJ), the Commission should make it clear that the ALJ should report back on the initial legal matters prior to addressing the remaining issues in this case.

IV. The Commission's Analysis and Action

Having considered the parties' comments, the Commission finds that it is appropriate to address the threshold legal and authority issues raised by Qwest before addressing the price and terms of the conversion of a UNE to a non-UNE service (the 370 Docket) and Qwest's procedures for handling commingled elements (the 371 Docket).

In addition, the Commission finds it more administratively efficient to refer the threshold legal and authority issues to the ALJ for development and a recommendation rather than to pursue a comment and reply process suggested by some of the parties.

Accordingly, the Commission will defer consideration of the substantive issues for now and instead refer issues relating to the scope of the Commission's authority and jurisdiction regarding the substantive issues raised in these two dockets to the Office of Administrative Hearings (OAH).

V. Jurisdiction and Referral for Contested Case Proceedings

The Commission has jurisdiction over the provision of intrastate telecommunications services under the Minnesota Telecommunications Act, Minnesota Statutes Chapter 237, including §§ 237.011, 237.06, and 217.16, among other statutes.

VI. Issues to be Addressed

The issues referred to the OAH for development in contested case proceedings before the ALJ require an examination of the Commission's scope of jurisdiction and authority to decide the issues in the two cited dockets. Specifically, the issues referred to the OAH are:

1. Whether the Commission has authority to set the rates and terms and conditions for the conversion of UNEs (as defined in the 1996 Telecommunications Act, Section 251) to Non-UNEs and for Commingled Arrangements; and
2. Whether, and to what extent, when competing local exchange carriers (CLECs) convert from UNEs to alternative services and purchase Commingled Arrangements, the services in question become interstate services subject to the FCC's exclusive jurisdiction rather than intrastate services subject to the Commission's jurisdiction.

VII. Procedural Outline

A. Administrative Law Judge

The Administrative Law Judge assigned to this case is Kathleen D. Sheehy. Her address and telephone number are as follows: Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401-2138; (612) 341-7602.

B. Hearing Procedure

Controlling Statutes and Rules

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minnesota Statutes §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minnesota Rules parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minnesota Rules parts 7829.0100 to 7829.3200.

Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 660 Olive Street, St. Paul, Minnesota 55155; (651) 297-3000. These rules and statutes also appear on the State of Minnesota's website at www.revisor.leg.state.mn.us.

The Office of Administrative Hearings conducts contested case proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota State Bar Association.

Right to Counsel and to Present Evidence

In these proceedings, parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minnesota Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions.

Discovery and Informal Disposition

Any questions regarding discovery under Minnesota Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minnesota Rules, part 1400.5900 should be directed to Ganesh Krishnan, Public Utilities Senior Rates Analyst, Minnesota Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651) 201-2215; or Jeanne Cochran, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, (651) 296-2106.

Protecting Not-Public Data

State agencies are required by law to keep some data not public. Parties must advise the Administrative Law Judge if not-public data is offered into the record. They should take note that any not-public data admitted into evidence may become public unless a party objects and requests relief under Minnesota Statutes § 14.60, subdivision 2.

Accommodations for Disabilities; Interpreter Services

At the request of any individual, this agency will make accommodations to ensure that the hearing in this case is accessible. The agency will appoint a qualified interpreter if necessary. Persons must promptly notify the Administrative Law Judge if an interpreter is needed.

Scheduling Issues

The times, dates, and places of evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and intervening parties.

Notice of Appearance

Any party intending to appear at the hearing must file a notice of appearance (ATTACHMENT A) with the Administrative Law Judge within 20 days of the date of this NOTICE AND ORDER FOR HEARING.

Sanctions for Non-compliance

Failure to appear at a prehearing conference, a settlement conference, or the hearing, or failure to comply with any order of the Administrative Law Judge, may result in facts or issues being resolved against the party who fails to appear or comply.

C. Parties and Intervention

The current parties to this case are Eschelon, Qwest, and the Department. Other persons wishing to become formal parties shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve copies of such petitions on all current parties and on the Commission. Minn. Rules, part 1400.6200.

D. Prehearing Conference

A prehearing conference will be held on July 3, 2007, at 9:00 a.m. in the Small Hearing Room, Minnesota Public Utilities Commission, 121 7th Place East, Suite 350, Saint Paul, Minnesota 55101, (651) 296-7124.

Parties and persons intending to intervene in the matter should attend the conference, prepared to discuss time frames and scheduling. Other matters which may be discussed include the locations and dates of hearings, discovery procedures, settlement prospects, and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

VIII. Application of Ethics in Government Act

The lobbying provisions of the Ethics in Government Act, Minnesota Statutes § 10A.01 *et seq.*, may apply to this case. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 296-5148, with any questions.

IX. Ex Parte Communications

Restrictions on *ex parte* communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minnesota Rules, parts 7845.7300-7845.7400, which all parties are urged to consult.

ORDER

1. The Commission hereby refers two issues to the Office of Administrative Hearings for contested case proceedings, as set forth above:
 - A. Whether the Commission has authority to set the rates and terms and conditions for the conversion of UNEs (as defined in the 1996 Telecommunications Act, Section 251) to Non-UNEs and for Commingled Arrangements; and

- B. Whether, and to what extent, when CLECs convert from UNEs to alternative services and purchase Commingled Arrangements, the services in question become interstate services subject to the FCC's exclusive jurisdiction rather than intrastate services subject to the Commission's jurisdiction.
2. A prehearing conference shall be held on Tuesday, July 3, 2007, at 9:00 a.m. in the Small Hearing Room at the offices of Minnesota Public Utilities Commission, 121-7th Place East, Suite 350, St. Paul, Minnesota 55101.
 3. All hearings, including the prehearing conference, may be recessed and reset by the Administrative Law Judge pursuant to Minn. Rules, Part 1405.1400 to 1405.2300.
 4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

100 Washington Square, Suite 1700
Minneapolis, Minnesota 55401-2138

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

121 Seventh Place East Suite 350
St. Paul, Minnesota 55101-2147

In the Matter of Qwest Corporation's
Arrangements for Commingled Elements

MPUC Docket No. P-421/C-07-370

In the Matter of Qwest Corporation's
Conversion of UNEs to Non-UNEs

MPUC Docket No. P-421/C-07-3701

OAH Docket No.

NOTICE OF APPEARANCE

Name, Address and Telephone Number of Administrative Law Judge: Kathleen D. Sheehy
(612) 341-7602; Office of Administrative Hearings, Suite, 1700, 100 Washington Square,
Minneapolis, Minnesota 55401.

TO THE ADMINISTRATIVE LAW JUDGE: You are advised that the party named below will
appear at the above hearing.

NAME OF PARTY:

ADDRESS:

TELEPHONE NUMBER:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER:

SIGNATURE OF PARTY OR ATTORNEY: _____

DATE: _____